

Chapter 19

ASIC's performance: the perspective of key stakeholders

19.1 The committee received evidence from many organisations representing various gatekeepers and other professionals, as well as from individual entities regulated by ASIC. Reflecting ASIC's broad remit, the committee heard from bodies representing company directors, lawyers, financial advisers and planners, the superannuation industry, company secretaries, accountants, auditors and insolvency practitioners. Evidence was also received from consumer groups, firms and specific entities regulated by ASIC, such as the Australian Securities Exchange (ASX).

19.2 Given the opportunities available to these bodies to interact with ASIC and other government agencies, these stakeholders have a unique and valuable perspective on ASIC's performance. Importantly, they can also channel the views of the industry or professionals they represent. This chapter examines the evidence received from these stakeholders regarding how ASIC works with their organisation.

19.3 The committee received suggestions about how industry expertise can be better utilised by ASIC through co-regulation and secondments. Such proposals can encourage better regulatory outcomes, but they can also lead to concerns about regulatory capture or allegations of conflicts of interest within the regulator. This chapter also considers these issues.

Overall views on working with ASIC

19.4 The committee was interested in canvassing the views that professional bodies, industry groups and market operators had on how ASIC worked with their organisations. Most of the evidence received on this topic was, overall, positive. For example, the ASX informed the committee that it works closely with ASIC and that the processes set up with regular meetings and exchange of information 'work well'. The ASX advised that ASIC 'has shown a willingness to actively engage with ASX' on various issues. As an example of the benefits of this close relationship, the ASX pointed to improvements made by ASIC to the rulemaking process for listing and operating rule changes.¹

19.5 Superannuation industry bodies also expressed a generally favourable view on ASIC's performance and how ASIC works with them. Like the ASX, the Australian Institute of Superannuation Trustees described a 'close association' it has had with ASIC in past years.² Industry Super Australia considered that, based on its interaction with ASIC over recent years, ASIC is 'fulfilling its functions reasonably effectively'.

1 ASX, *Submission 122*, p. 1.

2 Mr David Haynes, Executive Manager, Policy and Research, Australian Institute of Superannuation Trustees, *Proof Committee Hansard*, 19 February 2014, p. 31.

Industry Super Australia added that ASIC's capacity to regulate effectively depends on the legislative framework in place.³

19.6 The Governance Institute of Australia expressed its support for 'the manner in which ASIC has engaged with stakeholders as it seeks to strengthen the regulatory framework in place'. As an example of how it considers ASIC communicates effectively, it commended how ASIC kept stakeholders informed as the regulator's administrative and information management systems were improved.⁴

19.7 Two key accounting bodies were, however, sharply critical of ASIC. CPA Australia is of the view that ASIC, under its current management, has 'increasingly isolated itself from its key stakeholders':

Rather than collaborating in a genuine and constructive dialogue with potential partners in change, it is our view that ASIC is now defined by a combative, compliance focused approach which, on its Chairman's own admission, places a premium on "leveraging" media headlines over substantive outcomes...While this media driven approach is doubtless sometimes useful in creating a perception of action to paper over an otherwise unimpressive recent track record, it has unfortunately too often led to ASIC producing public communications that are confusing and which do little to tackle the risks faced in evolving capital markets and the corporate environment, such as insider trading and corporate failure.⁵

19.8 CPA Australia advised that it had raised its concerns with ASIC but that the response 'too often reveals a regulator with a glass jaw, content with shifting blame rather than responding in a considered or constructive way, or in the spirit of cooperation which previously defined the organisation's approach'.⁶ The Institute of Chartered Accountants of Australia (ICAA) also expressed concerns about ASIC's method of working with professional bodies. The ICAA's chief executive officer concluded:

We all share, ultimately, the same goals but in recent years it has not been an effective relationship.⁷

3 Ms Robbie Campo, Deputy Chief Executive, Industry Super Australia, *Proof Committee Hansard*, 20 February 2014, p. 30.

4 Governance Institute of Australia, *Submission 137*, p. 2.

5 CPA Australia, *Submission 209*, p. 1.

6 CPA Australia, *Submission 209*, p. 1.

7 Mr Lee White, Chief Executive Officer, Institute of Chartered Accountants Australia, *Proof Committee Hansard*, 19 February 2014, p. 42.

Processes for consultation and engagement

19.9 ASIC needs to engage with stakeholder bodies to be an effective regulator. Established processes for consultation and discussion can provide a useful means for matters that most concern industry to receive the regulator's attention and for industry associations to seek clarification of certain issues; the regulator's response can then be communicated to the members of those associations. In the same vein, these processes also provide an opportunity for ASIC to communicate any concerns it has about recent developments or certain behaviour. Importantly, engagement helps ensure ASIC is aware of, understands and accounts for industry developments when performing its statutory functions, including the function of providing advice to government.⁸ The ICAA also noted that the performance of regulators may be affected by the regulator's isolation from industry and that effective engagement and consultation can help avoid the negative implications of isolation:

That isolation on an individual or on teams over time does negate the manner in which you may perform your duties. It drives you to continuing to do things because that is what we have done. That is why I have reached out and we have used the example of the ATO and what Chris Jordan is starting to do in his culture change. We need to protect the independence of the organisation—there is no question about that—but somehow you need to make sure there are enough fresh sets of eyes coming in to alter—back to your question—the nature, so that there is sense of eagerness and desire to change things for the right reasons.⁹

19.10 There are at least two formal methods that ASIC utilises to consult with groups of stakeholder organisations. One is the ongoing general or industry-specific consultative committees that meet on a fixed basis. The other is by undertaking consultation on a specific regulatory issue.

Regular consultation with industry and consumer associations

19.11 ASIC currently has a number of external committees that provide it with a source of expertise and act as a means for stakeholder or industry feedback or concerns to be reported to ASIC. A consultative body that represents a cross-section of stakeholders is the External Advisory Panel. This panel currently comprises 17 members and includes senior members of the financial services industry,¹⁰ the legal profession and academia.¹¹ Other external consultative committees include the

8 *Australian Securities and Investments Commission Act 2001*, s. 12A.

9 Mr Lee White, Institute of Chartered Accountants Australia, *Proof Committee Hansard*, 19 February 2014, p. 47.

10 The current chair of the panel is Mark Johnson AO (chairman of Alinta Energy, former chairman of AGL Energy and deputy chairman of Macquarie Bank) and the deputy chair is Allan Moss AO (former managing director and CEO of Macquarie Group). For a current list of members, see www.asic.gov.au/asic/asic.nsf/byheadline/External+Advisory+Panel.

11 ASIC, *Submission 45.2*, p. 58; 'ASIC External Advisory Panel: Purpose, Governance and Practices Summary', March 2012, www.asic.gov.au (accessed 8 July 2013).

Consumer Advisory Panel, Market Supervision Advisory Panel and the Registry and Licensing Business Advisory Committee.¹²

19.12 ASIC advised that the External Advisory Panel meets on a quarterly basis with all of the commissioners. The other panels meet with selected commissioners, with the chairman attending on a periodic basis.¹³ ASIC's chairman informed the committee that he has strengthened the External Advisory Panel by expanding and rotating its membership. Mr Medcraft remarked that the senior business people on the panel act as 'ambassadors' for ASIC in the business community.¹⁴

19.13 As the inquiry progressed, it became evident that there are a number of additional regular formal meetings that ASIC conducts with some stakeholders. The Financial Planning Association advised that in addition to ad hoc meetings that may be required, it has a formal meeting with ASIC on a quarterly-basis. The chief executive officer of that organisation remarked:

To be quite honest, I feel like I could pick up the phone and call Peter Kell or Greg Medcraft at any stage, because I have dialogue with them as well.¹⁵

19.14 The chief executive officer of the Association of Financial Advisers similarly noted that his organisation meets with ASIC on a regular basis. He made some additional favourable comments on the working relationship that existed between senior ASIC representatives and his organisation:

We also have a regular ongoing schedule of meetings with Peter Kell and his team. That commenced early last year. In fact we have had Peter himself speak at our conferences and take part in the national road show that speaks to about 1,400 advisers nationally...The good thing we found was that conversations have been two-way. I think they are paying more respect now to the professional standing and to the knowledge and insight we can bring. Recent examples would be around the research into insurance switching advice.¹⁶

19.15 A representative of the Corporations Committee of the Law Council of Australia stated that when that committee has met in Melbourne, ASIC 'has been very good at sending along appropriate people and quite senior people, including at times commissioners, to those meetings on a regular basis, which the committee as a whole has very much appreciated':

12 ASIC, *Submission 45.2*, p. 58.

13 Mr Greg Medcraft, Chairman, ASIC, *Proof Committee Hansard*, 10 April 2014, p. 90.

14 Mr Greg Medcraft, Chairman, ASIC, *Proof Committee Hansard*, 10 April 2014, p. 90.

15 Mr Mark Rantall, Chief Executive Officer, Financial Planning Association, *Proof Committee Hansard*, 19 February 2014, pp. 71–72.

16 Mr Brad Fox, Chief Executive Officer, Association of Financial Advisers, *Proof Committee Hansard*, 19 February 2014, p. 72.

It is useful because at each meeting ASIC can answer questions about their policy, consultation papers and things like that. That is very helpful for practitioners. ASIC can also hear criticism of things we do not like. That is something that the committee in Melbourne has very much appreciated and I think ASIC is to be commended for that because it is very useful, I think for both sides, in terms of identifying issues that are arising and addressing them quickly.¹⁷

19.16 Consumer groups also expressed support for ASIC's approach to engagement and consultation. The Consumer Action Law Centre wrote favourably about the Consumer Advisory Panel:

While we have some concerns with ASIC's ability to respond in a timely way to matters referred to it...we are overall pleased with ASIC's collaboration with consumer advocates, particularly through the Consumer Advocacy [sic] Panel (CAP). The CAP provides a direct line of communication between consumer advocates and senior ASIC officials including the Deputy Chairman Peter Kell and frequently the Chairman, Greg Medcraft...In our experience the discussions at CAP meetings are informative, frank and useful, which compares very favourably with the common experience of meeting with government or industry representatives who can be unwilling to respond openly to questions or concerns.¹⁸

19.17 The Consumer Action Law Centre also noted that ASIC was responsive to suggestions for improving how the advisory panels operate. Following a recommendation made by that organisation, a process is now in place for ASIC to regularly report to consumer organisations on the progress of complaints made by those organisations, within the bounds of ASIC's confidentiality obligations.¹⁹

19.18 Other organisations were less supportive of ASIC's current approach to engagement with stakeholders. In its submission, CPA Australia advised that there is currently 'no ongoing regular contact between ASIC and the financial services industry'. CPA Australia stated that in the past ASIC consulted with financial services industry associations and their representatives through regular forums; these forums were subsequently replaced by a Financial Services Consultative Committee (FSCC). According to CPA Australia, meetings of the FSCC 'have not been held for a number of years', and that engagement is now limited to consultation papers that ASIC releases.²⁰ At a public hearing, however, it was revealed that ASIC contacted CPA Australia about ways to open dialogue soon after CPA Australia's submission to the committee was published. Mr Alex Malley from CPA Australia explained:

17 Mr Bruce Dyer, Member, Corporations Committee, Business Law Section, Law Council of Australia, *Proof Committee Hansard*, 20 February 2014, p. 3.

18 Consumer Action Law Centre, *Submission 120*, p. 5.

19 Consumer Action Law Centre, *Submission 120*, p. 5.

20 CPA Australia, *Submission 209*, pp. 3–4.

I have been contacted—I think several days after this submission—to open the door to some dialogue. I thought that was interesting timing. Nonetheless, I look forward to the future. If we can improve that, we would certainly seek to, and I know my colleague Mr White would work with us in that process.²¹

19.19 In response to questions about the FSCC, ASIC advised that it was established in 2007 as a forum to 'deal with general financial services issues that were not specific to a particular industry/association'. However, the FSCC was disbanded in 2008. ASIC submitted that this followed the restructure of ASIC that occurred at that time as well as feedback from participants that suggested 'they did not feel comfortable raising regulatory issues in front of one another'.²² Nevertheless, ASIC stressed that regular consultation between ASIC and financial services industry bodies and firms occurs. It advised that ASIC's commissioners meet 'at least annually' with the boards of key industry groups with more regular contact undertaken at lower levels.²³ During 2012–13, 620 meetings between ASIC and industry associations took place.²⁴

Ad hoc consultation

19.20 ASIC also engages in consultation on specific issues as required. This takes place formally through the release of consultation papers or draft regulatory guides for public comment. ASIC also meets with stakeholders to discuss specific issues of concern or as legislative or regulatory changes are being implemented. ASIC reported to the committee that in 2012–13 it issued 33 consultation papers for public comment with stakeholders having, on average, seven weeks to prepare a submission.²⁵ As an example, ASIC pointed to the extensive consultation processes it engaged in as part of the introduction of the Future of Financial Advice (FOFA) and Stronger Super reforms:

It is no exaggeration to say that there were multiple meetings every week around those issues, around how we were going to implement the law and around the concerns of individual companies. Also, there were national public meetings around the country.²⁶

19.21 In relation to FOFA and Stronger Super, the Australian Institute of Superannuation Trustees advised that it has worked closely with ASIC over the past three years as the reforms were being designed and implemented:

Our experience has been that ASIC's commitment to consultation has been evident throughout. I think it has been a challenge for government agencies

21 Mr Alex Malley, CPA Australia, *Proof Committee Hansard*, 19 February 2014, p. 44.

22 ASIC, answer to question on notice, no. 6 (received 25 March 2014), p. 15.

23 Mr Greg Medcraft, Chairman, ASIC, *Proof Committee Hansard*, 19 February 2014, p. 23.

24 ASIC, answer to question on notice, no. 6 (received 25 March 2014), p. 14.

25 ASIC, answer to question on notice, no. 6 (received 25 March 2014), p. 14.

26 Mr Peter Kell, Deputy Chairman, ASIC, *Proof Committee Hansard*, 19 February 2014, p. 23.

to manage and coordinate relationships between ASIC, APRA, ATO and other relevant regulators on the one hand and the industry on the other. But ASIC has generally done so efficiently and accessibly. As we mentioned in our submission, we have found their staff to be of a high quality and responsive and helpful.²⁷

19.22 CPA Australia, however, criticised some aspects of ASIC's issue-specific consultation. On the FOFA consultation process, CPA Australia complained that ASIC did not initially consult with the accounting profession and that attempts to become involved were frustrated:

Our request to be invited into the discussion when it related to the accounting profession and the other financial advisers were filibustered and delayed. We knew from talking to others in the market that they were having meetings, whereas we were not at the table at the time. So we had to kind of force our way into the discussion, and it ended with front-page newspaper ads.²⁸

Comparison with other agencies and jurisdictions

19.23 CPA Australia and the ICAA were the two organisations that expressed the most concern about ASIC's consultation and engagement processes. The chief executive officers of both organisations were asked to identify the agencies that, in their experience, engage in more effective consultation. The responses given were the New Zealand Financial Markets Authority and the ATO (under the new Commissioner of Taxation, Mr Chris Jordan AO).²⁹ The following remarks were made about the approach taken by the ATO:

Mr White: ...the early engagement that both organisations are now having with Chris Jordan, the commissioner of the ATO, is a real breath of fresh air. His approach to smarter and more effective regulation is admirable, and we want to work much more with him.

Mr Malley: I would simply concur with that, because we have had the same experience with the tax office.³⁰

19.24 Consultation can also be built into the statutory obligations and structure of the regulator. For example, the UK Financial Conduct Authority (FCA) is required by statute to 'make and maintain effective arrangements for consulting practitioners and consumers on the extent to which [the FCA's] general policies and practices are

27 Mr David Haynes, Australian Institute of Superannuation Trustees, *Proof Committee Hansard*, 19 February 2014, p. 31.

28 Mr Paul Drum, Head of Policy, CPA Australia, *Proof Committee Hansard*, 19 February 2014, p. 45.

29 *Proof Committee Hansard*, 19 February 2014, pp. 42, 44.

30 Mr Lee White, Institute of Chartered Accountants Australia; Mr Alex Malley, CPA Australia, *Proof Committee Hansard*, 19 February 2014, pp. 44–45.

consistent with its general duties...³¹ These arrangements must include a Practitioner Panel and a Consumer Panel, and the FCA must have regard to any representations made to it by these panels.³² The FCA has also established a Smaller Business Practitioners Panel and Markets Practitioner Panel.³³ The consumer panel, which is known as the Financial Services Consumer Panel, is examined further in Chapter 20.

Collaboration and whether there should be greater co-regulation

19.25 Collaboration between industry and ASIC that leads to regulatory issues or areas of concern being promptly and effectively addressed, either without additional state-imposed regulation or by such regulation being better targeted and implemented, is clearly a desirable outcome. For example, on measures to improve consumer protection, CPA Australia noted that the best way to achieve results 'is to build a relationship with the stakeholders who actually deliver the product and service to the consumer'.³⁴ Industry and professions can also perform effectively some of the tasks that the regulator may otherwise have to undertake; in Australia, the existence of such co-regulation is evident through external dispute resolution schemes, codes of conduct and disciplinary bodies.

19.26 The chief executive officer of the ICAA, Mr Lee White, argued that Australia's financial services regulatory framework could be made more efficient and effective through greater co-regulation. In his view, a co-regulatory model 'is a wonderful goal that we could substantially do now, if we have the intent', and that co-regulation could result in matters being addressed 'in a much more timely manner than they are'.³⁵ He noted that New Zealand has elements of a co-regulatory model. The ICAA's submission concluded:

While there will always be a need to maintain a clearly delineated separation of function and accountability between ASIC and external stakeholders, we believe there is a pressing need for ASIC to engage in greater regular collaboration with industry and professional bodies in order to achieve the most effective and efficient regulatory outcomes possible. To date, ASIC has not maximized the opportunity that is presented by a strong working relationship with co-regulatory stakeholders. There has been an apparent lack of willingness on ASIC's part to work in an open and shared manner in order to secure the right outcomes in the marketplace.³⁶

31 Financial Services and Markets Act 2000 (UK), s. 8.

32 Financial Services and Markets Act 2000 (UK), ss. 9, 10.

33 Financial Conduct Authority, *Corporate governance of the Financial Conduct Authority*, April 2013, www.fca.org.uk/your-fca/documents/corporate-governance (accessed 20 March 2014), p. 4.

34 Mr Alex Malley, CPA Australia, *Proof Committee Hansard*, 19 February 2014, p. 47.

35 Mr Lee White, Institute of Chartered Accountants Australia, *Proof Committee Hansard*, 19 February 2014, p. 47.

36 Institute of Chartered Accountants Australia, *Submission 203*, p. 2.

19.27 Professor Dimity Kingsford Smith argued that co-regulation could perform a role, however, in her view 'clear regulatory messages from the state' are required so that professional and industry associations:

have external legitimacy for bringing their good values forward, too, and doing the kind of work that they do, whether that is disciplinary tribunals, codes of conduct or dispute resolution for disenchanted financial consumers, and so on.³⁷

19.28 Professor Kingsford Smith suggested that ASIC does not have adequate powers under the legislation it administers to engage with professional bodies to the degree it may want to.³⁸

19.29 Organisations representing financial advice professionals expressed either supportive or qualified views on co-regulation. The Financial Planning Association of Australia argued that legislation should facilitate the establishment of co-regulatory approaches, particularly as legislation such as the Corporations Act is overarching and not-industry specific, whereas professional obligations are industry specific and better address the roles, services and consumer interactions of participants in that industry.³⁹ The Association of Financial Advisers noted some of the benefits of associated with co-regulation, but it questioned whether greater co-regulation would lead to additional external dispute resolution that could leave financial advisers subject to several dispute and disciplinary procedures.⁴⁰

19.30 When questioned about suggestions for greater or more formal co-regulation, ASIC's deputy chairman, Mr Peter Kell, advised that ASIC does look at co-regulation in various sectors. As an example of co-regulation, he cited the external dispute resolutions schemes such as the Financial Ombudsman Service and Credit Ombudsman Service, organisations that are 'integrated into the way [ASIC] would approach retail financial services'. However, Mr Kell added that ASIC assesses the risks and desirability of co-regulation on a sector-by-sector basis, to ensure that co-regulation or self-regulation is relied on only in sectors where it is effective. Mr Kell suggested that the financial advice sector was one area that, in ASIC's view, is not ready for co-regulation at the moment.⁴¹

19.31 Others expressed some misgivings about the level of trust associated with co-regulation. Professor Justin O'Brien pointed to Australia's experience of surviving the global financial crisis relatively unscathed to warn that there is a 'danger of

37 Professor Dimity Kingsford Smith, *Proof Committee Hansard*, 19 February 2014, pp. 54–55.

38 Professor Dimity Kingsford Smith, *Proof Committee Hansard*, 19 February 2014, p. 55.

39 Financial Planning Association of Australia, *Submission 234*, p. 8

40 Mr Brad Fox, Association of Financial Advisers, *Proof Committee Hansard*, 19 February 2014, p. 72.

41 Mr Peter Kell, Deputy Chairman, ASIC, *Proof Committee Hansard*, 19 February 2014, p. 24.

succumbing to hubris'. He added that the global financial crisis demonstrated that 'it is no longer enough to rely on stated trust—it has to be warranted':

Yes, it is true, none of our major banks collapsed, but we have seen widespread bad behaviour within the marketplace. We have seen the failure of boutique investment companies; we have seen the failure of managed investment funds. We have seen identified problems in this marketplace and we are beginning to see through the LIBOR and the currency manipulation scandals basically also Australian banks being implicated in that process. So I think it is essential that we utilise a hearing like this to really think through what are the weak points in our regulatory system, to what extent we can professionalise that regulatory system and to what extent we can actually introduce responsibility and restraint within it so that self-regulatory or co-regulatory initiatives have the opportunity to work.⁴²

19.32 Professor O'Brien added that if 'industry really wants co-regulation, it has to actually accept its responsibility for the integrity of that co-regulatory structure rather than leave it simply to ASIC'.⁴³

Industry secondments

19.33 Secondments between the regulator and industry can be an effective way for the regulator to gain 'real world' expertise and awareness of industry developments and current thinking. Several industry associations and other key stakeholders highlighted the benefits of secondments and suggested that ASIC should utilise them more. Industry Super Australia recommended that ASIC adopt a formal secondment process with ASIC employees working in the industry. It argued that this would ensure that ASIC's employees have 'a deeper understanding of the industry which it regulates, including market developments and culture'. Industry Super Australia added that 'it may also assist the industry to better understand the approach taken and the challenges and opportunities facing the regulator'.⁴⁴ Finally, Industry Super Australia noted that the secondment program would ideally connect ASIC with graduate and leadership programs operated by major institutions.⁴⁵

19.34 A representative from another superannuation body, the Australian Institute of Superannuation Trustees, reported that he had seen 'continuous improvements' in ASIC's staff engagement with, and understanding of, the superannuation industry. Nevertheless, he suggested that ASIC should establish a formal process for ASIC employees to be seconded to superannuation funds 'so they get a better appreciation of

42 Professor Justin O'Brien, *Proof Committee Hansard*, 19 February 2014, p. 60.

43 Professor Justin O'Brien, *Proof Committee Hansard*, 19 February 2014, p. 58.

44 Industry Super Australia, *Submission 201*, p. 13.

45 Industry Super Australia, *Submission 201*, p. 13.

the practical and operational aspects of running funds, as well as a better appreciation of the member focus of the not-for-profit sector'.⁴⁶

19.35 CPA Australia suggested that a strengthened secondment program could address gaps in ASIC's industry knowledge and provide ASIC officers with ideas on how ASIC could engage with industry better:

...I think when you go into the organisation at various levels and talk to people that what is probably missing at the moment is there is not a sense that there is enough of that 'on the street'—having lived in business long enough—to know what a big issue is from a small issue; what a one-off issue is from a systemic issue. It is about being blooded in a market. So perhaps...we need a rotational model that says for two years some of the future leaders of ASIC go out and work in business on a secondment and learn about how that world looks and breathes and feels, so that when they come in they are informed by that behaviour and perhaps know how to deal with it and engage it better.⁴⁷

19.36 The ICAA and the Governance Institute of Australia noted that suitable secondment programs could improve decision-making within ASIC; in particular, they suggested that more consistent decisions could be a result of such programs.⁴⁸

19.37 The Corporations Committee of the Law Council of Australia's Business Law Section also supported secondments between ASIC and law firms. It argued that the Takeovers Panel utilises secondments with 'great success', and that in the United States a secondment with the Securities and Exchange Commission 'is viewed as valuable career stepping stone'.⁴⁹ The senior secondments used by the UK regulator

46 Mr David Haynes, Australian Institute of Superannuation Trustees, *Proof Committee Hansard*, 20 February 2014, p. 33.

47 Mr Alex Malley, Chief Executive Officer, CPA Australia, *Proof Committee Hansard*, 19 February 2014, pp. 49–50.

48 The Governance Institute of Australia submitted that there 'is a lack of consistency in how ASIC staff may deal with matters, with sometimes variable approaches adopted in interpreting even the most basic processes. For example, when applying for an [AFS licence], Governance Institute of Australia members have experienced situations where different licensing conditions have been imposed for applications which are in all respects identical'. The Governance Institute also advised that company secretaries rely on advice or information from ASIC staff, however, 'there can be gaps between the advice being put forward and the reality of corporate governance practice' and that 'advice must be able to be practically implemented to ensure good governance outcomes'. The ICAA noted that inconsistent decision making 'can often be a source of frustration for investors and consumers'. See Governance Institute of Australia, *Submission 137*, pp. 7–8 and Institute of Chartered Accountants Australia, *Submission 203*, p.3.

49 Corporations Committee, Business Law Section, Law Council of Australia, *Submission 150*, p. 6.

were also cited. However, ASIC's resource constraints were noted, with one of the Law Council's representatives observing that 'there is no free lunch'.⁵⁰

19.38 While industry groups and professional associations were supportive of increased secondments, the committee received submissions that expressed concern about such arrangements. Some were based on a perception that ASIC is too close to the industries that it is supposed to regulate, and that the movement of employees between ASIC and the private sector supports this contention.⁵¹ However, the committee also received evidence from a former ASIC employee alleging that conflicts of interest were not appropriately managed during a secondment.

Allegations of conflicts of interest influencing ASIC's actions

19.39 A former employee of ASIC, Mr James Wheeldon, gave evidence to the committee about the lead up to regulatory relief being granted for online superannuation calculators in 2005. Mr Wheeldon alleged that ASIC was unduly influenced by the wishes of a key industry organisation and that the process for providing the relief was outside ASIC's stated procedures and had a pre-determined outcome. According to Mr Wheeldon, the relief granted as a result allowed online calculators to be offered that did not comply with the reasonable basis for advice obligation that was in place in the Corporations Act at the time. In his view, the calculators could simply be used by firms 'as a marketing tool to get people into their financial adviser network', by gathering information and not reflecting the impact of fees. He used a calculator offered by one firm as an example:

...it had no capacity for modelling fees in it; it acted as if fees did not exist. In fact, it would ask the user a bunch of very intrusive questions: how old are you? How old is your spouse? What is your income? What are your superannuation savings? How long do you plan on working for? And so on. Then it would come up with a projection which would not really have much to do with reality at all. Then, on the next page, it would say, 'Put in your phone number and your email address and we'll have a financial adviser call you'.⁵²

19.40 Mr Wheeldon also advised that the individual he was required to report to was a secondee from a firm that was a member of the industry organisation. Although the individual disclosed a potential conflict of interest, Mr Wheeldon advised that ASIC kept the secondee on the calculator relief project. Mr Wheeldon stated:

I have looked high and low for information about ASIC's policy of accepting secondees. If you go to the website you cannot find anything. If you go through their annual reports, which I have done for the last 10 years, there is effectively zero disclosure of the secondees from industry coming

50 Mr John Keeves, Chairman, Business Law Section, Law Council of Australia, *Proof Committee Hansard*, 20 February 2014, p. 8.

51 For example, see Mr Gus Dalle Cort, *Submission 301*, p. [3].

52 Mr James Wheeldon, *Proof Committee Hansard*, 2 April 2014, p. 19.

to ASIC...I also note that Mr Medcraft spoke to the Joint Committee on Corporations and Financial Services on Friday and he said, 'We are very careful about secondments. If we do secondments clearly we have to be sure that they are not into an area where they are regulating their own firm, for example.' Mr Medcraft said that there were very strict rules governing secondments. That was absolutely not true when I was working there...I think having secondments into the policy branch—you just cannot do it that way. ASIC need to have their own people who are doing that. That cannot be the only way that you get the skill in. If they want somebody who has got experience working for an investment bank or a top law firm, they should hire somebody and they should become members of the Australian Public Service and bound by the Public Service code of conduct and owing a fiduciary duty only to the Public Service and to the Australian people. But instead you had a fellow who I assume owed a duty primarily to his employer and he was representing his employer's interests within ASIC, and ASIC tolerated it.⁵³

19.41 The class order made by ASIC was a disallowable legislative instrument; that is, it was a form of delegated or subordinate legislation made by the executive that either House of Parliament could potentially, within a limited timeframe, disallow. Mr Wheeldon questioned the explanatory statement associated with the class order that was tabled in Parliament. He advised that the reason given in the explanatory statement for the lack of public consultation prior to relief being granted was because the relief was of 'a minor and machinery nature'. Mr Wheeldon alleged that the statement was 'deliberately misleading'.⁵⁴

ASIC's response

19.42 ASIC responded at length to Mr Wheeldon's testimony.⁵⁵ It 'completely' rejected the allegations that Mr Wheeldon made. ASIC described online calculators as 'a common and popular tool' and stated that without the legal relief granted by ASIC, both retail and industry superannuation funds may have been unable to provide such calculators. ASIC described the situation as 'an unintended result of broader reforms to the financial services law implemented in 2002, which meant generic super calculators could be caught under the personal advice requirements':

So instead of being free and easily accessible, consumers wanting to use these online calculators would have to see a financial planner for personal advice, which can be expensive and time consuming. This clearly was not a sensible or desirable situation, and ASIC initially provided public guidance to the industry in May 2004 to help with the provision of these calculators.

53 Mr James Wheeldon, *Proof Committee Hansard*, 2 April 2014, p. 22.

54 Mr James Wheeldon, *Proof Committee Hansard*, 2 April 2014, p. 19.

55 See ASIC, 'Opening statement made by ASIC at a public hearing held in Canberra on 10 April 2014', *Additional Information 4*, pp. 7–9 and ASIC, *Submission 45.5*.

However, significant uncertainty remained, which the Government at that time publicly recognised in its 2005 consultation paper on *Refinements to Financial Services Regulation*. The Government noted ASIC would provide guidance or legal relief for the provision for online calculators to 'promote their use'.

In May 2005, ASIC announced it would grant legal relief to the whole industry (what we call class order relief), and in June that year we issued this relief for super calculators following consultation with a range of super industry bodies. We extended this relief to other investment calculators later that year following further public consultation.⁵⁶

19.43 ASIC emphasised that because every fund could use the legal relief irrespective of the industry association they belonged to, there was 'no special treatment'. The conditions attached to the relief required that the assumptions underpinning the calculators needed to be reasonable and that clear and prominent statements about the purpose and limitations of the assumptions were displayed. Further, ASIC argued that the law against misleading and deceptive conduct still applied.⁵⁷

19.44 In a supplementary submission, ASIC provided further information about the process associated with this class order. ASIC stated that the industry association was not required to lodge a formal relief application as formal applications are only required where an individual seeks relief from the law as it applies to them.⁵⁸ On how the secondee's potential conflict of interest was managed, ASIC noted that the secondee was bound by ASIC's general conduct requirements of employees, including the APS Code of Conduct. ASIC advised that there was 'awareness' of the potential conflict and that the secondee was not a decision maker, was closely supervised by a senior manager and worked on the issue as a member of a team.⁵⁹ ASIC emphasised that the decisions were made by senior officers:

Both the initial decision to grant relief applying to superannuation calculators and the subsequent decision to extend the relief were made by ASIC's Regulatory Policy Group, over a series of meetings in 2005. ASIC's Regulatory Policy Group meets approximately every fortnight and considers new or revised regulatory policy, law reform and novel applications for relief. Its membership comprises Commissioners and senior leaders from across ASIC. In other words, proposals for relief of this type are not decided only by the team directly responsible for developing the work.⁶⁰

56 ASIC, *Additional Information 4*, pp. 7–8 (emphasis omitted).

57 ASIC, *Additional Information 4*, p. 8.

58 ASIC, *Submission 45.5* pp. 4, 7–8.

59 ASIC, *Submission 45.5*, pp. 11–12.

60 ASIC, *Submission 45.5*, p. 7.

19.45 ASIC added that the examination of the relevant files to date does not enable it to confirm whether the employee amended internal issues papers or drafted emails to the industry body, although any internal papers or emails 'would have been settled by a senior ASIC officer'.⁶¹

19.46 When asked about Mr Wheeldon's assertion that the online calculators were primarily used as a marketing tool, ASIC dismissed the concerns:

No, it is a condition of the class order relief provided to superannuation funds that the calculators are not used to market particular products and that they must spell out the assumptions that are underpinning the calculations and the clear limitations of the calculators are also set out. We take that very seriously. It is also the case that firms providing these calculators to their fund members have to satisfy the ASIC Act requirements not to mislead or deceive. So we do not believe they are being used as marketing tools in that way. In fact, how we see them being used generally is as very useful tools to help consumers provide a guide for themselves about the sort of amount they will end up with in retirement.⁶²

19.47 However, ASIC was also questioned about a particular online calculator available after the relief was granted, but which was later removed from the firm's website. Specifically, ASIC was asked how the calculator modelled fees, how the effects of the fees were presented to the user and whether the calculator could be considered primarily to be a marketing tool to attract people to the firm's financial adviser network. ASIC's response was that it is not in a position to comment on the online calculator as it did not review it.⁶³

Committee view

19.48 It is evident that, overall, the industry associations and consumer groups that deal with ASIC on a regular basis are generally supportive of ASIC's approach to consultation. ASIC should be commended for this. In particular, the committee is pleased that ASIC has been responsive to suggestions for improving consultation and the flow of information between it and other groups, such as those made by the Consumer Action Law Centre. The committee acknowledges the consultative bodies ASIC currently utilises and recognises that ASIC has managed to secure the involvement of experienced and talented individuals as participants on these committees. The committee considers that these processes should provide ASIC with a valuable source of expertise and an effective means for two-way communication between the regulator and key stakeholders.

19.49 ASIC's relationships with all of the major professional and industry associations matter. When ASIC suggests that an industry needs to address a

61 ASIC, answer to question on notice, no. 12 (received 21 May 2014), pp. 18–19.

62 Mr Peter Kell, Deputy Chairman, ASIC, *Proof Committee Hansard*, 10 April 2014, pp. 91–92.

63 ASIC, answer to question on notice, no. 12 (received 21 May 2014), p. 20.

particular issue, the nature of that response—constructive or otherwise—can depend on whether that industry respects and has a sound relationship with ASIC. Within the accounting profession there were clearly strong concerns about ASIC's approach, although it must be acknowledged that the two accounting bodies the committee received evidence from are in the minority: most industry and professional associations gave favourable evidence about their engagement with ASIC. Nevertheless, the committee appreciates the frank evidence it received from CPA Australia and the ICAA. Given accountants are key gatekeepers in Australia's financial system, CPA Australia's and the ICAA's descriptions of the relationship they have with the regulator are troubling. The committee is not particularly interested in which side is at fault; the relationship between ASIC and the accounting bodies simply needs to be repaired.

Recommendation 31

19.50 The committee recommends that the accounting bodies and ASIC work to repair their relationship and commit to a more constructive approach to discussing regulatory issues. The committee requests that ASIC provide a written report to the committee in six months' time informing the committee of progress achieved in strengthening this relationship.

19.51 The evidence in support of greater co-regulation was of interest to the committee. Effective and low-cost ways to improve conduct in particular sectors should be identified and taken into account in regulatory design, and if it is demonstrated that co-regulation proposals meet this test, they should be considered. ASIC appears to be aware of the benefits and difficulties associated with co-regulation on a sector-by-sector basis. The committee does not consider that the case has been made during this inquiry for the ASIC Act to be amended to require greater co-regulation. The committee notes that this may be an issue that the Financial System Inquiry will consider, particularly as it is tasked with assessing the effectiveness and need for financial regulation and the roles of government and its financial regulators. Other recommendations made by the committee in this report may also support more effective self-regulation and co-regulation.

19.52 In addition to co-regulation, more practical and effective regulatory outcomes can also be promoted by providing ASIC employees with greater awareness of how the industries ASIC regulates actually function. Secondments are one way to achieve this, and the committee encourages ASIC to utilise them. However, the committee notes the concern in some segments of the community about the perception that ASIC is too close to the entities it is supposed to regulate, and that secondments can intensify suspicions about ASIC's conduct. ASIC needs to be careful to avoid undue influence being exercised on its actions as a result of the secondment process. Importantly, ASIC also has to be *seen* to be careful that the integrity of its decision-making is not undermined by secondments. ASIC needs to be more transparent about the secondment processes it has and the policies in place for managing possible conflicts of interest.

Recommendation 32

19.53 The committee recommends that ASIC publish on its website information about its secondment programs and the policies and safeguards in place that relate to these programs.

19.54 Finally, the committee wishes to comment on the allegations made by a former ASIC employee about ASIC being unduly influenced by an industry association as a result of a secondment.

19.55 The committee's comments will be of a general nature as it has considered this evidence in the context of broader questions about ASIC's performance and accountability. It would be more appropriate for the specific allegations to be considered by the Commonwealth Ombudsman, either after receiving a complaint from Mr Wheeldon or on an 'own motion' basis. The committee understands that the Commonwealth Ombudsman would be able to consider the allegations (other than the allegation that Parliament was misled), although as the allegations relate to events that occurred ten years ago, an investigation may face a number of practical impediments. The committee recognises that the Commonwealth Ombudsman is an independent statutory officer and that any investigation would be at the Ombudsman's discretion. The committee notes that, for future allegations, the *Public Interest Disclosure Act 2013* provides a process for public officials to report suspected wrongdoing in the Australian public sector. The committee's recommendation regarding greater transparency about ASIC's secondment processes should also help instil confidence that ASIC is aware of these issues and manages potential conflicts of interest appropriately.

Recommendation 33

19.56 The committee requests that the Commonwealth Ombudsman consider undertaking an own-motion investigation into the allegations related to the process that resulted in ASIC granting regulatory relief for generic online calculators in 2005. An investigation undertaken by the Ombudsman should, in particular, consider whether the process was undermined because ASIC did not adequately manage a conflict of interest identified by a person on secondment from a financial services firm.

19.57 The committee agrees with ASIC that online calculators are an important educational tool for consumers. However, the committee is concerned that after it made the class order granting relief, ASIC did not review the calculators the industry designed and published. This is a further example of ASIC not displaying sufficient scepticism of the industry it regulates and not monitoring compliance with an arrangement it has authorised.

19.58 ASIC's ability to grant exemptions or modifications to the operation of the Corporations Act and certain other legislation is a significant power that should be exercised carefully. It is essential that both the process leading to relief being granted and the compliance monitoring that occurs afterwards are sound. In future,

the committee urges ASIC to monitor more actively and assess compliance with the conditions of the relief it grants. It may assist the Parliament, regulated entities and other interested persons if the explanatory statement associated with class orders specifically advises that ASIC will be monitoring compliance.

Recommendation 34

19.59 The committee recommends that after exercising its discretionary powers to grant relief from provisions of the legislation it administers, ASIC should ensure that it puts in place a program for monitoring and assessing compliance with the conditions of the relief.